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## Local Government Law

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## LOCAL GOVERNMENT LAW

*Kenneth M. Murchison\**

The October 1987 term of the United States Supreme Court produced no dramatic surprises in local government law. As usual, the Court handed down important decisions in cases involving local governments, but this year's decisions tended to amplify prior doctrine rather than to break new ground. For example, opinions involving first amendment claims emphasized the need for standards limiting the power of local governments to restrict freedom of expression<sup>1</sup> and upheld an ordinance that limited picketing in residential areas.<sup>2</sup> In addition, the Court narrowly defined the class of local governmental officials and employees whose activities may give rise to governmental liability under 42 U.S.C. § 1983.<sup>3</sup>

As usual, the bulk of the local government law cases decided by the Louisiana courts during the past year involved public employees and the tort liability of local governments. Significant decisions clarified the procedural protections mandated by the Constitution before public servants can be discharged<sup>4</sup> and the scope of the restrictions imposed on

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1. *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988) (ordinance that gives mayor unfettered discretion to deny newsrack permit application or to condition permit on any terms mayor deems "necessary and reasonable" violates first amendment).

2. *Frisby v. Schultz*, 108 S. Ct. 2495 (1988) (ordinance that bans picketing which is focused on and taking place in front of a particular residence is not facially invalid under the first amendment).

3. *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988) (findings that decisions of supervisors were not individually reviewed for propriety by higher supervisory officials and that the civil service commission decided appeals in a circumscribed manner which gave substantial deference to original decision maker were insufficient to support conclusion that supervisors were authorized to establish city employment policy with respect to transfers and layoffs). For an analysis of the Supreme Court's earlier decision in *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980), which refused to extend the good-faith immunity defense to governmental defendants in litigation under section 1983, see Murchison, *Developments in the Law, 1979-1980—Local Government Law*, 41 La. L. Rev. 483, 509-18 (1981) [hereinafter Murchison, 1979-1980 Developments].

4. See *Brumfield v. Department of Fire*, 523 So. 2d 876 (La. App. 4th Cir. 1988) (Louisiana Constitution requires that fire fighter be given written notice of proposed discharge prior to pre-discharge hearing required by *Loudermill*); see also *Maurello v. Department of Health and Human Resources*, 510 So. 2d 458 (La. App. 1st Cir.), writ

public servants by state ethics laws.<sup>5</sup> But most of the cases involving public employees concerned the protections available to civil service employees. In those decisions, the courts did far more than simply review the merits of individual disciplinary actions.<sup>6</sup> They approved a municipal requirement that city employees reside in the city<sup>7</sup> and resolved

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denied, 514 So. 2d 460 (1987) (due process required that state employee be given notice of her right to respond to the charge that she abandoned her position prior to termination). During 1987-88, the federal courts of appeal also rendered several important opinions regarding the constitutional rights of public employees. See, e.g., *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988) (public employee's personal stake in employment dispute that involves a matter of public concern does not remove employee's comments about dispute from first amendment protection); *White v. Elrod*, 816 F.2d 1172 (7th Cir. 1987), cert. denied, 108 S. Ct. 286 (1987) (county could constitutionally discharge only ringleaders of guards who participated in illegal strike).

5. See *In re Schneckenburger*, 518 So. 2d 497 (La. 1988) (where permits from the office of the municipal director of inspection and code enforcement were required to build a house on the lot, the director violated prohibition against public servant receiving thing of economic value in consideration of services rendered when he bought a lot, obtained a variance from the Board of Appeals, and sold lot to contractors and developers); *Gravois v. State*, 517 So. 2d 423 (La. App. 1st Cir. 1987), writ denied, 520 So. 2d 119 (1988) (ethics code forbids school board from accepting bid from spouse of superintendent's executive secretary even though he was the lowest bidder in sealed bid competition); *In re Sea Shell, Inc.*, 509 So. 2d 90 (La. App. 1st Cir. 1987) (corporation wholly owned by siblings of parish president violated code by entering into contract to supply shell to parish).

6. See, e.g., *O'Brien v. Department of Police*, 522 So. 2d 1231 (La. App. 4th Cir. 1988) (civil service commission decision upholding appeals of two police officers was justified by city attorney's failure to prosecute cases diligently); *Ellins v. Department of Health*, 519 So. 2d 850 (La. App. 4th Cir. 1988) (technician's conduct, in bypassing triage desk and taking patient who had reportedly suffered several seizures in short period of time directly to accident room in accordance with physician's instructions did not impair efficiency of service sufficiently to justify technician's dismissal); *Boyce v. Department of Streets*, 518 So. 2d 20 (La. App. 4th Cir. 1987), writ denied, 519 So. 2d 144 (1988) (employees who followed thirty-three-year-old department policy when they left work early when no more work presented itself and remained "on call" at home while charging city for eight-hour day were not subject to dismissal or discipline); *Carr v. Sewerage and Water Bd.*, 517 So. 2d 1197 (La. App. 4th Cir. 1987) (hearing officer properly excluded proffered testimony concerning altercation between civil service employee and foreman where supervisor testified that incidents away from immediate job site had no bearing on his action in dismissing employee); *Leslie v. New Orleans Police Dept.*, 508 So. 2d 157 (La. App. 4th Cir. 1987) (police officer's failure to deliver original arrest warrant, evidence, and bulletin on wanted subject or to complete and to forward supplemental report during the course of the investigation provided legal cause for ten-day suspension). For a decision reviewing a dismissal under the Teacher Tenure law, see *Marcotte v. Avoyelles Parish School Bd.*, 512 So. 2d 538 (La. App. 3d Cir.), writ denied, 513 So. 2d 823 (1987) (evidence of principal's mismanagement of school funds was sufficient to justify his dismissal).

7. *Hensley v. City Planning Comm'n*, 517 So. 2d 1205 (La. App. 4th Cir. 1987).

issues concerning promotions,<sup>8</sup> layoffs,<sup>9</sup> and compensation.<sup>10</sup> The tort decisions also covered a wide variety of topics: identification of the responsible office or governmental entity;<sup>11</sup> the standards of care applicable in suits involving sheriffs,<sup>12</sup> schools and school boards,<sup>13</sup> parishes,<sup>14</sup>

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8. See *Snell v. City of Shreveport*, 514 So. 2d 698 (La. App. 2d Cir. 1987) (reemployment of retired police officer in "over-strength" position caused no harm to fellow police officer where it did not prejudice his promotion rights).

9. See *Rudloff v. Department of Civil Serv.*, 514 So. 2d 595 (La. App. 4th Cir. 1987) (letter challenging validity of 1983 service rating and layoff based on average of that rating with those for two other years was appeal of layoff rather than of nonappealable rating itself).

10. See *City of Lafayette v. Comp Time for Certain Firemen*, 525 So. 2d 181 (La. App. 3d Cir. 1988) (civil service board could not reverse fire chief's decision regarding payment for compensatory time unless the chief acted in bad faith or without cause or was arbitrary and capricious); *New Orleans Firefighters Ass'n of La. Local 632 v. City Civil Serv. Comm'n*, 521 So. 2d 452 (La. App. 4th Cir. 1988) (amount of regularly occurring work time for which firemen were entitled to sick leave pay was 56-hour week, which they regularly worked, rather than 48-hour week); *Beverly v. Sewerage and Water Bd.*, 519 So. 2d 172 (La. App. 4th Cir. 1987) (despite reinstatement by civil service commission, employees were not entitled to back pay when they were partly at fault for their dismissal).

11. See *Paridon v. Parish of Rapides*, 524 So. 2d 780 (La. App. 3d Cir. 1988) (parish was not liable for accident that occurred on road that was owned and maintained by the state); *Griffin v. Foti*, 523 So. 2d 935 (La. App. 4th Cir. 1988) (sheriff, not city, was liable for injuries suffered by inmate in parish jail, whether claim was based on negligence or strict liability); *Duhon v. Calcasieu Parish Police Jury*, 517 So. 2d 1016 (La. App. 3d Cir. 1987) (sheriff was liable under doctrine of respondeat superior for action of inmate who was driving tractor from which injured inmate fell); *St. Amant v. Callais & Sons, Inc.*, 508 So. 2d 887 (La. App. 5th Cir. 1987) (parish was not liable for alleged inadequate and unsafe traffic controls at highway intersection owned and maintained by state).

12. See *Calloway v. City of New Orleans*, 524 So. 2d 182 (La. App. 4th Cir. 1988) (sheriff was negligent in failing to transport pregnant prisoner to hospital when she first complained of abdominal pains where sheriff's employees knew prisoner was pregnant and that she was complaining of abdominal pains).

13. See *Laneheart v. Orleans Parish School Bd.*, 524 So. 2d 138 (La. App. 4th Cir. 1988) (school must provide supervision for children who are waiting on school grounds for school bus or participating in before or after hours activities sanctioned by school); *Springer v. St. Bernard Parish School Bd.*, 521 So. 2d 461 (La. App. 4th Cir. 1988) (school board was not liable for injuries sustained by volunteer assistant coach who jumped over chain link playground fence to retrieve softball and slipped on wet grass); *St. Pierre v. Lombard*, 512 So. 2d 1206 (La. App. 5th Cir. 1987) (school board that rented stadium to secondary school for athletic event but assumed no duty under the contract to provide security for the event was not liable to parents of boy who was fatally stabbed while attending the event).

14. See, e.g., *Tracy v. Parish of Jefferson*, 523 So. 2d 266 (La. App. 5th Cir. 1988) (parish liable under negligence and strict liability theories for its failure to maintain water meter in such a way that accumulation of grass between meter and lid would not cause the lid to give way when a person stepped on it); *Garrett v. City of Baton Rouge*, 521 So. 2d 638 (La. App. 1st Cir.), writ denied, 523 So. 2d 235 (1988) (notice of spill on

municipalities,<sup>15</sup> and other local governmental entities;<sup>16</sup> the scope of the statutory immunity afforded to those who own land devoted to recreational uses;<sup>17</sup> and the personal liability of individual public servants.<sup>18</sup>

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road could not be imputed to city-parish simply because there may have been city-parish trucks in the area on the day of the accident); *Douget v. Allen Parish Police Jury*, 520 So. 2d 813 (La. App. 3d Cir. 1987) (police jury has legal duty to erect warning signs sufficient to warn motorists of hazardous conditions); *Webster v. Terrebonne Parish Council*, 515 So. 2d 461 (La. App. 1st Cir. 1987), writ denied, 516 So. 2d 368 (1988) (even assuming that floor of courthouse was wet at time of accident, parish that employed morning and evening maintenance crew and that saw to it that floor was swept at least once daily adequately fulfilled its duty to keep floors reasonably safe); *Michel v. Ascension Parish Police Jury*, 524 So. 2d 1369 (La. App. 1st Cir.), writ denied, 530 So. 2d 567 (1988) (police jury was liable for failing to erect railings on bridge crossing canal); *Kogos v. Payton*, 522 So. 2d 1198 (La. App. 4th Cir. 1988) (city was not vicariously liable for actions of officer who injured person during an altercation that arose out of barroom argument because officer was not acting within the course and scope of his employment).

15. *Riche v. City of Baton Rouge*, 515 So. 2d 765 (La. 1987) (easily removable barricades that city had placed around catch basin, which had been washed from original position, and which had floated around street for two to four months posed an unreasonable risk of harm to cyclist lawfully driving on the street); *Cashio v. State*, 518 So. 2d 1063 (La. App. 1st Cir. 1987) (village was not liable under maintenance contract for damages arising out of accident that resulted from design and construction of highway rather than its maintenance); *Brown v. Department of Transp. and Dev.*, 513 So. 2d 379 (La. App. 4th Cir. 1987), writ denied, 515 So. 2d 446 (1987) (absent knowledge of dangerous condition, city was not liable for drainage line that state had the obligation to maintain); *Cormier v. City of Breaux Bridge*, 524 So. 2d 764 (La. App. 3d Cir. 1988) (one-inch protrusion in street did not present unreasonable risk of harm); *Scales v. St. John*, 522 So. 2d 1192 (La. App. 4th Cir.), writ denied, 523 So. 2d 1331 (1988) (city was liable under article 2317 where evidence supported the trial court's finding that obstructed traffic signal at the intersection was a substantial factor in causing the accident); *Moon v. City of Baton Rouge*, 522 So. 2d 117 (La. App. 1st Cir. 1987) (city-parish was strictly liable for its failure to maintain safe highway shoulder at site of accident); *Garrett v. City of Baton Rouge*, 521 So. 2d 638 (La. App. 1st Cir. 1988) (oil-based tar spill on road did not present an unreasonable risk of harm).

16. *Batiste v. City of New Orleans*, 518 So. 2d 1180 (La. App. 4th Cir.), writ denied, 521 So. 2d 1188 (1988) (sewerage and water board was strictly liable for damages resulting from subsidence caused by leakage problems at sewer collection point); *Ivey v. Housing Authority*, 514 So. 2d 661 (La. App. 2d Cir. 1987) (parking barrier consisting of pipe raised approximately one and one-half feet above ground and running parallel to sidewalk was not defective because it did not present an unreasonable risk of harm).

17. *Adams v. State*, 525 So. 2d 55 (La. App. 3d Cir. 1988) (recreational use immunity statute applied to situation where plaintiff was injured while diving off homemade diving platform at rural recreational area). For discussions of the Louisiana statute and recent decisions construing it, see Murchison, *Developments in the Law, 1986-1987—Local Government Law*, 48 La. L. Rev. 303, 327-29 (1987) [hereinafter Murchison, 1986-1987 *Developments*]; Murchison, *Developments in the Law, 1985-1986—Local Government Law*, 47 La. L. Rev. 305, 323-32 (1986) [hereinafter Murchison, 1985-1986 *Developments*].

18. *Touchton v. Kroger Co.*, 512 So. 2d 520 (La. App. 3d Cir. 1987) (officers were not responsible for issuance of worthless check warrant, arrestee failed to state a cause of action against the officers for malicious prosecution); *Hamrick v. Lee*, 511 So. 2d 818

Another large number of local government law decisions concerned election problems, a reminder that 1987 was an election year in Louisiana. In addition to resolving the normal attacks on local option elections,<sup>19</sup> the courts also heard a number of other election challenges. In these decisions the courts reemphasized the necessity of proving irregularities sufficient to change the outcome of the election,<sup>20</sup> concluded that the seven-day period for challenging an election is a peremptive one that cannot be extended,<sup>21</sup> and held that votes cast for a candidate who dies before election day should not be counted in determining whether the front runner received a majority of the total votes cast.<sup>22</sup> The 1987-88 decisions also addressed a variety of pre-election controversies. The Louisiana Supreme Court held that the election statutes which require candidates to be electors of the parishes in which they seek election are inapplicable to candidates for the post of coroner.<sup>23</sup> It also applied to an action to enjoin the holding of a recall election the requirement that one who challenges an election show irregularities sufficient to change the outcome.<sup>24</sup> The courts of appeal allowed a candidate to use a nickname on his notice of candidacy form;<sup>25</sup> concluded that a candidate remains a domiciliary of the parish in which he has

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(La. App. 5th Cir. 1987) (failure of court clerk to bring outstanding attachment to attention of judge when case was dismissed did not render her liable to arrestee where clerk never assumed any duty to particular plaintiff in regard to attachment and no statute or court rule imposed such a duty on the clerk).

19. See *Helling v. Webster Parish Police Jury*, 523 So. 2d 904 (La. App. 2d Cir.), writ denied, 525 So. 2d 534 (1988) (1972 local option statute governed powers of parish police jury when 1974 amendments were ruled unconstitutional); *Acy v. Allen Parish Police Jury*, 520 So. 2d 866 (La. App. 3d Cir. 1987) (adoption of new ordinance allowed denial of beer permit even though applicant had previously been awarded writ of mandamus to compel issuance of permit under prior ordinance).

20. See *Davis v. McGlothlin*, 524 So. 2d 1320 (La. App. 3d Cir.), writ denied, 525 So. 2d 1046 (1988) (election contestant failed to state cause of action where number of viable voting challenges was insufficient to vary outcome of election); *Burford v. Sanders*, 520 So. 2d 993 (La. App. 2d Cir. 1987) (order of new election was proper where evidence was sufficient to support finding of irregularities sufficient to change the result).

21. *Small v. Desselle*, 520 So. 2d 1167 (La. App. 3d Cir. 1987) (suit filed after seven-day period for election contest fails to state a cause of action).

22. *Broussard v. Miller*, 514 So. 2d 765 (La. App. 3d Cir.), writ denied, 516 So. 2d 122 (1987).

23. *Gonzales v. Fraiche*, 510 So. 2d 1258 (La. 1987). Prior to *Gonzales*, the third circuit had held in *Miller v. Poimboeuf*, 514 So. 2d 484 (La. App. 3d Cir. 1987), that a candidate for the office of coroner must be a resident of the parish in which he seeks office but need not be domiciled in such parish. In *Miller*, the court's decision apparently was not appealed because the candidate was a resident of the parish in which he sought election.

24. *Bougere v. Edwards*, 517 So. 2d 141 (La. 1987) (reversing 517 So. 2d 351 (La. App. 5th Cir. 1987)).

25. *Wilson v. Butler*, 513 So. 2d 304 (La. App. 1st Cir. 1987).

filed his candidacy even though he and his family later reside temporarily in another parish after the family residence is destroyed;<sup>26</sup> and construed the statute that calls for an annual canvass and purge of the voting rolls "in January" to require merely that the canvass and purge be initiated in that month.<sup>27</sup>

Louisiana's appellate courts also produced opinions worthy of note in other areas. These opinions addressed a wide variety of issues including state control over local governments,<sup>28</sup> conflicts between local governing authorities and elected and appointed officials,<sup>29</sup> land use regulation,<sup>30</sup>

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26. *Chandler v. Brock*, 510 So. 2d 778 (La. App. 2d Cir. 1987).

27. *Louisiana Voter Registration/Educ. Crusade, Inc. v. Office of the Registrar of Voters for the Parish of Orleans*, 511 So. 2d 1190 (La. App. 4th Cir.), writ denied, 512 So. 2d 854 (1987).

28. *Bellard v. City of Eunice*, 524 So. 2d 797 (La. App. 3d Cir. 1988) (notwithstanding contrary city ordinance, state statute entitles city employee to full pay during period in which employee is performing reserve duties while on military leave); *Bruno v. City of New Orleans*, 523 So. 2d 1384 (La. App. 4th Cir. 1988) (state statute requires that civil service commission include officers' state supplemental pay in calculating overtime).

29. See *Konrad v. Jefferson Parish Council*, 520 So. 2d 393 (La. 1988); *infra* notes 34-78 and accompanying text. See also *Registrar of Voters v. Morehouse Parish Police Jury*, 521 So. 2d 827 (La. App. 2d Cir.), writ granted, 524 So. 2d 514 (1988) (contribution by police jury on behalf of parish registrar of voters to parish insurance program was a salary supplement that could not be reduced during registrar's incumbency in position); *Bourgere v. Anzelmo*, 517 So. 2d 1121 (La. App. 5th Cir. 1987), writ denied, 519 So. 2d 130 (1988) (ordinance giving aldermen final veto of, or assent to, hiring or firing of each noncivil service municipal employee conflicted with statute giving mayor day-to-day responsibility for administering municipal government, but ordinance requiring mayor to certify to aldermen that person who was proposed for hire met all of qualifications for position did not conflict with mayor's statutory powers).

30. See *Lozes v. Waterson*, 513 So. 2d 1155 (La. 1987); *Jones v. Cusimano*, 524 So. 2d 172 (La. App. 4th Cir.), writ denied, 525 So. 2d 1057 (1988); *infra* notes 79-108 and accompanying text. See also *Tolis v. Cooper*, 522 So. 2d 594 (La. App. 1st Cir. 1988) (despite conflict between restrictive covenant and land use ordinance, landowner was not entitled to variance where there was nothing peculiar about land for which variance was sought and landowner had actual knowledge of zoning requirement prior to pouring of slab so that there was no demonstrable hardship); *Schoop v. New Orleans Alcoholic Beverage Control Bd.*, 519 So. 2d 831 (La. App. 4th Cir. 1988) (city's failure to deny liquor permit within statutory period did not entitle owner to permit); *Busalacchi v. Board of Zoning Adjustments*, 519 So. 2d 167 (La. App. 4th Cir. 1987) (board had no authority to grant variance from height limitations pertaining to garage); *Annison v. Hoover*, 517 So. 2d 420 (La. App. 1st Cir. 1987), writ denied, 519 So. 2d 148 (1988) (municipality may impose restrictions on property that are more restrictive than those placed by preexisting covenants, and such stricter restrictions constitute a taking only if they destroy a major part of the property's value); *Fleckinger v. Jefferson Parish Council*, 510 So. 2d 429 (La. App. 5th Cir. 1987) (given unique nature of area devoted exclusively to large lots and large homes, parish council did not abuse its discretion in including that resubdivision would violate neighborhood norm and would violate best interests of general welfare); *Zoning Bd. of Hammond v. Tangipahoa Ass'n for Retarded Citizens*, 510 So. 2d 751 (La. App. 1st Cir.), writ denied, 515 So. 2d 445 (1987) (city was entitled

constitutional limits on the taxing power of local governments,<sup>31</sup> public contracts,<sup>32</sup> and the interpretation of the Open Meeting and Public Record laws.<sup>33</sup>

The most significant of the state decisions fall within three categories: conflicts between local governments and independent elected officials, land use regulation, and the taxing authority of local governments. The remainder of this article examines these decisions in detail.

#### CONFLICTS BETWEEN LOCAL GOVERNMENTS AND ELECTED PUBLIC OFFICERS

In Louisiana many of the public officers who are elected from local (usually parochial) districts remain independent of local governing au-

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to injunction against operation of community home for mentally handicapped adults in area zoned for single family dwellings). For a discussion of earlier cases involving restrictions of group homes in residential areas, see Murchison, 1985-1986 Developments, *supra* note 17 at 316-23.

31. See *City of New Orleans v. Scramuzza*, 507 So. 2d 215 (La. 1987); *infra* notes 108-34 and accompanying text. See also *City of New Orleans v. Baumer Foods, Inc.*, 521 So. 2d 428 (La. App. 4th Cir.), writ granted, 523 So. 2d 219 (1988) (equipment that was assembled into immovable assembly line upon its arrival at manufacturing plant became immovable by destination and was not, therefore, subject to the city's use tax); *Campbell v. St. Tammany Parish Police Jury*, 517 So. 2d 192 (La. App. 1st Cir. 1987), writ denied, 520 So. 2d 424 (1988) (creation of sales tax district excluding municipal residents of parish did not violate due process rights of municipal residents nor deny them equal protection); cf. *State Bond Comm'n v. All Taxpayers*, 510 So. 2d 662 (La. 1987) (statute authorizing state to issue revenue anticipation notes is constitutional).

32. See *Bristol Steel and Iron Works, Inc. v. State*, 507 So. 2d 1233 (La. 1987) (statute granting Louisiana residents a five percent preference in letting contracts for public works is constitutional because it is rationally related to the legitimate state interest of encouraging Louisiana industries); *Donald M. Clement Contractor, Inc. v. St. Charles Parish*, 524 So. 2d 86 (La. App. 5th Cir. 1988) (unsuccessful lowest bidder had no right to notice or hearing on rejection of sewerage system bid due to failure to provide A rated bid bond); *King Cold Storage Warehouse, Inc. v. City of New Orleans*, 522 So. 2d 169 (La. App. 4th Cir. 1988) (public body with authority to make the determination of who is lowest responsible bidder is given wide discretion, and its judgment will not be overturned unless arbitrary or capricious).

33. *Wagner v. Beauregard Parish Police Jury*, 525 So. 2d 166 (La. App. 3d Cir. 1988) (police jury could void appointment made in violation of agenda rule of Open Meetings Law); *Jackson v. Board of Comm'rs*, 514 So. 2d 628 (La. App. 4th Cir.), writ denied, 515 So. 2d 1111 (1987) (contract adopted at meeting where matter was not on agenda and no vote was taken was void because the action violated the Open Meetings Law); *State v. Burnes*, 516 So. 2d 375 (La. App. 4th Cir. 1987) (report prepared by homicide detectives called to scene of crime by officers who investigated complaint was not the initial report of the officers investigating the complaint and thus was not a public record to which defendant was entitled to access).



thorities.<sup>34</sup> In a series of decisions rendered over the past several years, the state's appellate courts have defined the relationship between those officers and the local governments in the areas they served. Most of the cases have involved tort liability,<sup>35</sup> but fiscal conflicts have also surfaced on several occasions.<sup>36</sup>

During 1988, the Louisiana Supreme Court had to resolve two new fiscal controversies. Although the court decided one of the cases in favor of the public official and the other in favor of the local government, the court employed the same general approach in both cases by referring the matter to the legislature for final resolution.

The first of the 1988 decisions, *Konrad v. Jefferson Parish Council*,<sup>37</sup> involved a constitutional challenge to certain action undertaken by a local government. In *Konrad* the judges of the Jefferson Parish Juvenile Court complained that the establishment of a Department of Juvenile Services by the Parish of Jefferson interfered with the inherent constitutional powers of their court. The supreme court rejected that claim and remanded the case for trial on other issues.

Understanding the dispute between the parish and the judges requires a brief review of the constitutional and statutory provisions regarding juvenile courts and the juvenile courts in Jefferson Parish in particular. Article V of the 1974 constitution establishes the state judicial system. Section 18 provides that juvenile court shall have the jurisdiction provided by law.<sup>38</sup> Additionally, Article VI, Section 25 forbids local governments

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34. See, e.g., La. Const. art. VI, §§ 5(G) (home rule charter of a local government cannot affect the offices of district attorney, sheriff, assessor, clerk of district court, or coroner in any manner inconsistent with the constitution or state law) and 25 (courts and their officers may be established only as provided in the judiciary article).

35. See, e.g., *Jenkins v. Jefferson Parish Sheriff's Office*, 402 So. 2d 669 (La. 1981), analyzed in Murchison, *Developments in the Law, 1981-1982—Local Government Law*, 43 La. L. Rev. 461, 477-83 (1982) [hereinafter Murchison, 1981-1982 *Developments*]; see also La. R.S. 42:1441.1-.4 (Supp. 1988), analyzed in Murchison, *Developments in the Law, 1984-1985—Local Government Law*, 46 La. L. Rev. 491, 523-25 (1986).

36. See, e.g., *City of New Orleans v. State*, 426 So. 2d 1318 (La. 1983), analyzed in Murchison, *Developments in the Law, 1982-1983—Local Government Law*, 44 La. L. Rev. 373, 396-98 (1983).

37. 520 So. 2d 393 (La. 1988). Justice Watson dissented. The premise of his brief dissenting opinion was the proposition that the juvenile court had exclusive authority "to direct and control matters having to do with juvenile offenders." In his view, the parish ordinance establishing the juvenile services department infringed on that authority and violated "the separation powers doctrine of the Louisiana Constitution." *Id.* at 400.

38. La. Const. art. V, § 18: "Notwithstanding any contrary provision of [the section providing for jurisdiction of district courts], juvenile . . . courts shall have jurisdiction as provided by law." See generally Hargrave, *The Judiciary Article of the Louisiana Constitution of 1924*, 37 La. L. Rev. 765, 781-80, 809-14 (1977).

from enacting laws or ordinances that create or affect courts or their officers.<sup>39</sup>

The Louisiana legislature established the Juvenile Court for Jefferson Parish in 1958.<sup>40</sup> The current statute specifies the jurisdiction of the court<sup>41</sup> and also requires the parish to "provide suitable quarters for the court" and to "make necessary provisions for the conduct of the business of the court" and for its "expenses."<sup>42</sup>

The arrangement for providing probation services for the Juvenile Court for Jefferson Parish has developed over the last three decades.<sup>43</sup> Originally, the juvenile court judge hired the probation officers and paid them from the court's budget, which the parish funded in accordance with state law. After the voters of the parish approved a special millage dedicated "to juvenile court services" in 1971, the judges continued to hire probation officers and other employees, but paid them from the millage revenues. Most of these employees were treated as parish employees covered by the parish civil service system, but the Director of Court Services was not a civil service employee.

Sometime later, the parish council and the juvenile court judges became embroiled in a dispute concerning the operation of the juvenile services program and the use of millage revenues to construct a new facility for the juvenile court. When the judges removed the Director of Court Services from her position, the parish council created the Department of Juvenile Services and hired the former Director to head it up. The employees of the new department apparently included all of those persons who had formerly provided probation services under the supervision of the juvenile court judges, and the parish continued to use the millage revenues to pay their salaries.

The juvenile court judges then brought suit for a declaratory judgment, challenging the parish's new program for providing probation services to juveniles. They faulted the new arrangement on three grounds: (1) it violated the constitutional protection afforded to their court, (2) it was inconsistent with the state statutes governing juvenile courts, and (3) it diverted the millage revenues from their dedicated purposes.<sup>44</sup> Finding merit in the first of these contentions, the trial court ruled in favor of the judges.

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39. La. Const. art. VI, § 25: "Notwithstanding any provision of this Article, courts and their officers may be established or affected only as provided in Article V of this constitution."

40. 1958 La. Acts Ex. Sess. No. 10, § 1, adding La. R.S. 13:1596(A).

41. La. R.S. 13:1599 (Supp. 1988).

42. La. R.S. 13:1596(E) (1983).

43. For the supreme court's summary of that development, see *Konrad v. Jefferson Parish Council*, 520 So. 2d 393, 395 (La. 1988).

44. 520 So. 2d at 395.

The decision of the Louisiana Supreme Court on appeal was a narrow one. The sole question before the court was whether the action of the parish council conflicted with the constitutional prerogatives of the juvenile court.<sup>45</sup> The supreme court held that the constitution did not mandate such exclusive control. Accordingly, the court remanded the case to the district court to consider the other claims that the judges had raised.<sup>46</sup>

The supreme court's analysis of the issue presented in *Konrad* was straightforward. An amendment to the 1921 Constitution authorized Jefferson Parish to adopt a plan of government that was "subject to the provisions of the Constitution and laws of this state with respect to powers and functions of local governments."<sup>47</sup> Under the Louisiana Constitution of 1974 the plan of government remains in effect, and the parish retains those powers, duties, and functions it enjoyed when the constitution became effective, "[e]xcept as inconsistent with [the] Constitution."<sup>48</sup>

According to the Louisiana Supreme Court, the Jefferson Parish plan of government authorizes the parish council to establish a department of juvenile services.<sup>49</sup> As a result, the council's action could not be assailed unless some state statute or some provision of the constitution precluded it.<sup>50</sup> No state statute, however, forecloses local governments from developing juvenile services programs or from operating juvenile detention facilities; indeed, the relevant state statute expressly authorized juvenile courts to use detention facilities other than those operated by the court.<sup>51</sup> Thus, the judges' claim was reduced to the contention that

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45. *Id.* at 396.

46. *Id.* at 399, 400.

47. La. Const. of 1921, art. XIV, § 3(c)(2) (amended 1956).

48. La. Const. art. VI, § 4. The provision authorizing the establishment of the Jefferson Parish charter provided that the plan of government was "subject to the . . . laws of this state with respect to the powers and functions of local governments." La. Const. of 1921, art. XIV, § 3(c)(2).

49. 520 So. 2d at 396. The court did not identify what provision in the plan of government conferred this power on the parish council. Although the plan does not include a specific provision on creating departments, cf. Jefferson Parish Home Rule Charter and Plan of Government, § 2.01 (A)(5) (providing council authority to consolidate departments), it does vest the parish with "all the powers. . .to which it [was] entitled" under the 1921 constitution including "all implied powers necessary and proper for putting them into effect." *Id.* § 1.01. Article 2 makes the parish council "the legislative and policymaking body of the parish" with authority "to exercise all powers of the parish." *Id.* § 2.01; see also *id.* § 2.01(A)(9) (granting parish council authority to "[p]erform any other acts, consistent with law, deemed to be for the best interest of the people of the parish").

50. 520 So. 2d at 398.

51. See La. R.S. 13:1578 (1983):

Provisions shall be made for the temporary detention of children in a detention home, to be conducted as an agency of the court *or other appropriate*

the parish's operation of a department of juvenile services was inconsistent with the constitution, in particular, the provisions of Article V, section 18 that authorize juvenile courts.

The court gave three reasons for rejecting the constitutional argument advanced by the judges. First, the state constitution grants juvenile courts and other courts of limited jurisdiction less protection from legislative interference than it gives courts of general jurisdiction. The legislature not only has the power to abolish or merge such courts; it also prescribes the extent of their jurisdiction.<sup>52</sup> Second, no state law gives exclusive jurisdiction and authority over juvenile matters to the juvenile courts. The legislature has not enacted any statutes that grant juvenile courts exclusive control of probation services, and the supreme court has not prescribed any administrative rules to that effect. Third, in a footnote, the court declared that it found "persuasive" but not "conclusive" the "fact that no other juvenile court . . . in the state deems it necessary to control exclusively any post adjudication services to juveniles."<sup>53</sup>

The court's resolution of the issue presented in *Konrad* was commendable. All three reasons cited by the court reflect valid concerns. Neither the text of the constitution nor any state legislation expressly supports the judges' claim. A decision in favor of the judges would have required construing the constitution to mandate a system that other juvenile courts have found unnecessary or undesirable. Moreover, conferring upon the juvenile courts an exclusive power to provide juvenile probation services would have unnecessarily restricted the authority of local governmental subdivisions. If parishes and municipalities are permitted to provide juvenile services in cooperation with their juvenile courts, they may make important contributions to helping juveniles that are under the courts' supervision. Unfortunately, the parties in *Konrad* have thus far been unable to cooperate. If that inability persists, the proper authority to resolve the conflict is the legislature.

Given the narrowness of the holding in *Konrad*, the court's decision in that case obviously does not bring an end to the litigation between the judges and the parish. In particular, the supreme court did not consider whether the parish has improperly diverted dedicated tax revenues. The judges allege that the funding for the new department established by the parish comes from a millage dedicated exclusively to "juvenile court services." If that claim is proved at trial, then the dedicated funds remain under the control of the juvenile court alone.

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*public agency* . . . . (emphasis added).

This statement seems to leave open the possibility that local governments may operate such houses.

52. La. Const. art. V, § 18; *Konrad*, 520 So. 2d at 398.

53. *Id.* at 399.

In addition, the court also noted that the juvenile court can provide post-adjudication services to juveniles even though it cannot forbid the parish from providing similar services.<sup>54</sup> If the services provided by the parish fail to meet the needs of the juveniles under the court's jurisdiction, the court apparently can require that those services be provided from other sources. The court might then classify the costs incurred in providing those services as court "expenses" for which the parish must make provision under state law.<sup>55</sup> So long as those expenses are reasonable, the judges can obtain writs of mandamus ordering their payment.<sup>56</sup>

The second of the 1988 cases that involved a dispute between an elected official and the parish governing authority shows the potential for resolving these conflicts on the basis of statutes rather than the constitution. In *Reed v. Washington Parish Police Jury*,<sup>57</sup> a district attorney and the local police jury disagreed on the appropriate level of funding for his office. In an argument similar to the one advanced by the judges in *Konrad*, the district attorney contended that the local government's action interfered with the constitutional prerogatives of his office. The supreme court, however, managed to decide the case without reaching the constitutional claim.<sup>58</sup> Instead, the court held that the statute which authorized the parish to contribute to the district attorney's operational expenses required it to fund those expenses to the extent that they were reasonable.<sup>59</sup>

The dispute in *Reed* concerned the Washington Parish Police Jury's 1986 appropriation for the expenses of the district attorney for the Twenty-Second Judicial District. Although the district attorney requested an appropriation of \$145,025.00, the police jury appropriated only \$42,246.12. The district attorney responded by seeking a writ of mandamus to compel the police jury to provide more adequate funding.<sup>60</sup>

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54. *Id.*

55. La. R.S. 13:1596(E) (1983).

56. *McCain v. Grant Parish Police Jury*, 440 So. 2d 1369 (La. App. 3d Cir. 1983); cf. *Reed v. Washington Parish Police Jury*, 518 So. 2d 1044 (La. 1988) (police jury must pay reasonable expenses of district attorney).

57. 518 So. 2d 1044 (La. 1988). Justice Dennis submitted a brief concurring opinion, see *infra* note 66, and Justice Dixon dissented without opinion.

58. *Id.* at 1045.

59. *Id.* at 1049.

60. 518 So. 2d at 1045. The police jury actually paid \$45,070.87, slightly more than was originally appropriated. The district attorney covered the bulk of the remainder of his expenses from the criminal court fund. In addition, he also received \$14,550.68 from the the special fund established pursuant to Revised Statutes 16:16 and \$4,091.24 from the worthless check fund.

The district court's judgment granting the writ was reversed on appeal by the Louisiana First Circuit Court of Appeal.<sup>61</sup> The supreme court then granted certiorari.<sup>62</sup>

The task facing the supreme court was to construe that part of Louisiana Revised Statutes 16:6 under which local governing bodies are "authorized to pay from their general funds" certain designated expenses of the district attorney. According to the court, "[t]he word 'authorized' is susceptible to two interpretations, one mandatory and one permissive": it could be a "direction to the police jury to act," or it could merely "empower[] the police jury to act."<sup>63</sup> Ultimately, the court concluded that the statute imposes a mandatory rather than a permissive duty. To support that conclusion, the court relied on the language of the statute, the history of the statute's evolution into its present form, and the statute's relation to the other methods of funding for the expenses of the district attorney's office.

The *Reed* court began its analysis by examining the language of Louisiana Revised Statutes 16:6. The first paragraph of that section provides that the district attorney "shall" be entitled to two expense allowances, one for the salaries of his office employees and the other for mailing, telephone, transportation, and related expenses. The second paragraph provides a means for paying the allowances by authorizing the parish governing authority to pay the expenses listed in the first paragraph. Construing the paragraphs together, the court reasoned that the duty imposed by the second has to be mandatory. According to the court, finding that the duty of the second paragraph is permissive would negate the mandatory language of the first<sup>64</sup> because "[i]t would make little sense for the legislature to create a mandatory expense allowance and then tell the providers of the fund they were free to fund that expense allowance or not."<sup>65</sup> Although "authorized" might seem a curious word to use to impose a mandatory duty, the court discerned an obvious reason that the legislature would choose such a term for a funding statute like section 6. The choice of that term was "nothing more than a legislative recognition of the principle that a police jury is a creature of the state and possesses only those powers conferred by the state's constitution and statutes." Without the legislative authorization, the police jury would have been "powerless to act."<sup>66</sup>

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61. *Reed v. Washington Parish Police Jury*, 515 So. 2d 635 (La. App. 1st Cir. 1987).

62. 518 So. 2d at 1049.

63. *Id.* at 1045.

64. *Id.* at 1046.

65. *Id.* at 1046.

66. *Id.* Justice Dennis' concurring opinion noted that the 1974 constitution abrogated the concept of "creature's of the state" for local governments with home rule charters. *Id.* at 1049.

After examining the language of the statute, the court reviewed the statute's historical development in some detail. As originally enacted in 1938, the section established a \$1200 expense account funded by the state.<sup>67</sup> A 1959 amendment increased the state reimbursement to \$5000 and added a second paragraph that authorized police juries to pay for expenses that exceeded this amount.<sup>68</sup> The statute assumed its present form following its amendment in 1973. That amendment deleted the provision for state funding from the first paragraph and eliminated from the second paragraph the \$5000 threshold for police jury funding.<sup>69</sup> In the court's view, "throughout the history of [this section] the Legislature envisioned [that] the Legislative branch of either state or local government would bear the primary responsibility for funding the expenses."<sup>70</sup> Thus, the court concluded, when "the state abandoned its role in funding [the] expenses" in 1973, the legislature must have "intended to place the entire burden for funding the 16:6 expenses on the police jury."<sup>71</sup>

Finally, the court considered the various alternate funding sources that the legislature has provided for district attorneys and the significance that these sources have for the proper interpretation of section 6. Three statutes other than section 6 provide funds that the district attorney may use to defray the expenses of the office. Louisiana Revised Statutes 15:571.11 creates a criminal court fund that is used in part to pay certain expenses of the district attorney's office,<sup>72</sup> Louisiana Revised Statutes 16:15<sup>73</sup> allows the district attorney to collect a worthless check fee for each worthless check that he processes, and Louisiana Revised Statutes 16:16<sup>74</sup> imposes a special ten dollar charge on every criminal defendant who is convicted, pleads guilty, or forfeits a bond.

The court began its consideration of the significance of these funding sources by rejecting the suggestion of the court of appeal that the criminal court fund, rather than the allocation made by the local government, was intended to be "the primary source of revenues" for funding the operations of the district attorney's office. The district attorney, the court observed, needs a "reliable source of funding to ensure the effective operation of the office." The criminal court fund, however, does not satisfy that criterion. It fluctuates in amount and its size is affected "by a number of factors." Further, the court noted, the assets in the criminal court fund are not available to the district attorney without

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67. 1938 La. Acts No. 20, §§ 1, 2.

68. 1959 La. Acts No. 113, § 17.

69. 1973 La. Acts No. 115, § 1.

70. 518 So. 2d at 1047.

71. *Id.*

72. La. R.S. 15:571.11(A)(1)(a) (Supp. 1988).

73. La. R.S. 16:15 (Supp. 1988).

74. La. R.S. 16:16 (Supp. 1988).

court approval.<sup>75</sup> Thus, the court found that the legislature could not have intended for the district attorney to rely on the criminal court fund as its chief source of revenues.

Instead of supplanting the mandatory duty of the police jury, the supreme court reasoned, the various alternative funding sources simply provide supplementary sources of revenue to meet "the increased cost of operating the district attorney's office." These funding sources, the court found, were inadequate "to ensure that the basic function of the district attorney will not be impaired." Although the availability of alternate funds "suggest[ed] a need for cooperative intergovernmental relations," the court suggested that the proper forums for resolving problems arising from lack of cooperation between district attorneys and local governments are "the legislature" and "the political arena."<sup>76</sup>

The *Reed* court's desire to provide district attorneys with a reliable source of funding was understandable, and its plea for cooperation between local governments and district attorneys was laudable. Unfortunately its decision gave the district attorney more protection than was required, and it is also likely to discourage rather than encourage the intended cooperation. These results of the decision seem particularly undesirable at present because many parish governing authorities in Louisiana are currently facing dire financial situations.

*Reed's* most obvious defect is its overprotection of district attorneys. By imposing an absolute obligation on the police jury to fund the reasonable expenses of the district attorney, *Reed* allows the district attorney to hoard other sources of funding.<sup>77</sup> The district attorneys can then use those funds to support nonessential activities that could be eliminated without impairing "the basic function of the district attorney." The record in *Reed* reveals that the alternative funds available to the district attorney may be quite substantial.<sup>78</sup> Thus, a preferable construction of the statute would obligate the parish to fund the district attorney's office only to the extent that the moneys available from the alternate sources are insufficient to defray the district attorney's reasonable expenses.

From a practical standpoint, the *Reed* decision is unlikely to promote cooperation. It will effectively force police juries to exempt district attorneys from the expenditure reductions that most parishes are now

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75. 518 So. 2d at 1048.

76. *Id.* at 1048-49.

77. See, e.g., *Baton Rouge Morning Advocate*, October 18, 1988, § B, at 1, col. 1 (even though Tangipahoa Parish Council faces a budget shortfall of 40 percent, district attorney demands a substantial increase in appropriation on the ground that all of his reasonable expenses have to be funded regardless of the impact on other services provided by the parish).

78. See *supra* note 60.



making. If funding for the district attorney is exempted from these cuts, then funding for other parish services will probably have to be decreased. Furthermore, under the rule of *Reed*, the parish governing authority, and not the district attorney, will have to appeal to the voters to support increased taxes should additional revenues be needed to fund increases in the expenses of running the district attorney's office. Such developments can only generate still more dissension between local governments and district attorneys.

Furthermore, the danger to parish governments posed by the likely effects of *Reed* is not a fanciful one. The state is transferring the cost of many functions and services to the local level, and many parishes have limited resources to pay those costs. Some have even contemplated bankruptcy. Given the existence of this financial emergency, it is particularly unfortunate that the court construed Louisiana Revised Statutes 16:6 in a manner designed to exempt district attorneys from the consequences of this financial emergency.

Of course, the court's decision need not be the final word. Since the court based its holding on the statute rather than the constitutional status of the district attorney, legislative revision is possible. The legislature should amend Louisiana Revised Statutes 16:6 to require cooperation. It should require the district attorney to pay the reasonable expenses of the office from the dedicated sources of revenue to the extent that they are available. If those funds are insufficient to provide for the reasonable expenses of the office, then the police jury should be required to fund the remainder. Such a statutory revision would both provide for the legitimate needs of the district attorneys and minimize the financial burden on parishes.

#### LAND USE REGULATION

In Louisiana, as elsewhere, nonconforming land uses present difficult policy choices for land use regulators. On the one hand, nonconforming uses are, by definition, inconsistent with the comprehensive plan, and allowing them to continue undermines the plan.<sup>79</sup> On the other hand, basic considerations of equity and fairness, as well as federal<sup>80</sup> and state<sup>81</sup> prohibitions against taking private property without paying just compensation, counsel that local governments should permit landowners to

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79. See *Fuller v. City of New Orleans*, 311 So. 2d 466, 468 (La. App. 4th Cir. 1975).

80. U.S. Const. amend. V. For an analysis of recent decisions of the United States Supreme Court defining what constitutes a taking under federal law, see Murchison, 1986-1987 Developments, *supra* note 17, at 308-22.

81. La. Const. art. I, § 4; see generally, Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 10-20 (1974).

continue uses that antedate the restrictions established in the zoning ordinances.

As originally enacted in 1926,<sup>82</sup> Louisiana's Zoning Enabling Act did not require that municipal zoning ordinances contain exceptions for nonconforming uses. A 1929 decision of the state supreme court confirmed the constitutionality of requiring commercial establishments located in newly created residential districts to close within one year after the effective date of a new zoning ordinance.<sup>83</sup> But early decisions also upheld the practice of exempting nonconforming uses from zoning regulations,<sup>84</sup> and a 1948 amendment to the enabling act required such an exemption for premises "which have been continuously used for commercial purposes since January 1, 1929, without interruption for more than six consecutive months at any one time."<sup>85</sup>

Although the 1948 amendment to the Zoning Enabling Act does not expressly require exemptions for nonconforming uses begun *after* January 1, 1929, the typical local zoning ordinance includes exemptions for all nonconforming uses in existence on the ordinance's effective date.<sup>86</sup> Like the Act, many local ordinances also provide for the termination of the exemption if the property is subjected to some use other than its nonconforming use for a period of six months.<sup>87</sup>

Two recent Louisiana decisions clarify exactly when local governments may terminate nonconforming uses for nonuse. Both concerned the proper construction of the six-month nonuse provision in the New

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82. 1926 La. Acts No. 240 (codified with amendments at La. R.S. 33:4721-31 (1988)). An earlier statute had given cities with populations over 50,000 authority to control business uses. 1918 La. Acts No. 27 (codified at La. R.S. 33:4731-32 (1988)).

The Louisiana statute was part of a national trend. In 1926, the United States Supreme Court upheld a comprehensive municipal zoning ordinance against federal constitutional challenges in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926). For early Louisiana analyses of the power to zone, see Fordham, *Legal Aspects of Zoning and Local Planning in Louisiana*, 6 La. L. Rev. 495 (1946); Burns, *Police Power in Zoning*, 7 Loyola L.J. 16 (1926).

83. *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613, cert. denied, 280 U.S. 556, 50 S. Ct. 16 (1929).

84. *Sampere v. City of New Orleans*, 166 La. 776, 117 So. 827 (1928), *aff'd*, 279 U.S. 812, 49 S. Ct. 262 (1928); *State ex rel. Manhein v. Harrison*, 164 La. 564, 114 So. 159 (1927).

85. 1948 La. Acts No. 471, § 1 (codified at La. R.S. 33:4722(C) (1988)).

86. See, e.g., *City of New Orleans, Comprehensive Zoning Ordinance* art. 12, § 1; *City of Alexandria, Comprehensive Zoning Law*, art. V, § 1; *City of Kenner, Zoning Ordinances* § 19.01; *City of Baton Rouge - Parish of East Baton Rouge, Code of Ordinances* § 7:302.

87. See, e.g., *City of New Orleans, Comprehensive Zoning Ordinance* art. 12, § 2; *City of Kenner, Zoning Ordinance* § 19.03; cf. *City of Alexandria, Comprehensive Zoning Law* art. V, § 55(5) (6 consecutive months or 18 months during any three-year period); but see *City of Baton Rouge—Parish of East Baton Rouge, Code of Ordinances* § 7:304 (requiring 12-month vacancy to terminate a commercial use in a residential area).

Orleans zoning ordinance, and both involved rental property that the owners had failed to lease during the six-month period. In one, the Louisiana Supreme Court ruled that the property's use as a multi-family dwelling did not come to an end when two of the four units were vacant for more than six months.<sup>88</sup> In the other, the fourth circuit held that a six-month vacancy in all seven of the units in an apartment building terminated the property's nonconforming use exemption even though the vacancies resulted from a depressed rental market.<sup>89</sup>

Like the state enabling act, the New Orleans zoning ordinance establishes a six-month period for terminating nonconforming uses on account of nonuse, but the ordinance is considerably more specific than the statute. It expressly applies to the nonconforming use of a "building or portion thereof or land," and it terminates the nonconforming use exemption whenever the building or land "becomes and remains vacant for a continuous period of 6 calendar months." The ordinance also amplifies the vacancy requirement by declaring that neither "the intention of the owner nor that of anybody else" nor any "makeshift or pretended nonconforming use" is to be "taken into consideration in interpreting . . . the word 'vacant'." Finally, the ordinance qualifies the general termination-for-nonuse rule in three respects. First, it states that a lessee's failure to occupy or to use the premises in accordance with the nonconforming use does not create a vacancy until the owner reassumes legal control of the property's occupancy and use. Second, it offers an exemption from the vacancy requirement for property involved in bankruptcy proceedings. Third, it establishes a similar exemption for property involved in foreclosure proceedings.<sup>90</sup>

*Lozes v. Waterson*<sup>91</sup> was the first of the two nonconforming use decisions. *Lozes* involved a fourplex apartment building that was situated in an area zoned for two-family dwellings. Two of the apartments remained vacant for more than eight months while the owner refurbished them and sought new tenants. The plaintiffs<sup>92</sup> contended that these

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88. *Lozes v. Waterson*, 513 So. 2d 1155 (La. 1987).

89. *Jones v. Cusimano*, 524 So. 2d 172 (La. App. 4th Cir.), writ denied, 525 So. 2d 1057 (1988).

90. City of New Orleans, Comprehensive Zoning Ordinance art. 12, § 2 (reprinted in *Jones v. Cusimano*, 524 So. 2d 172, 173 (La. App. 4th Cir.), writ denied, 525 So. 2d 1057 (1988)).

91. 513 So. 2d 1155 (La. 1987). Justice Marcus, who dissented, accepted the plaintiffs' characterization of the property as "being used in part for conforming purposes (two units) and in part for nonconforming purposes (two units)." When two units remained unrented, "the part used for nonconforming purposes" was "vacant." Because the vacancy continued for more than six months, the nonconforming use was terminated and the property was subject to the restrictions of the zoning ordinance. *Id.* at 1158.

92. The plaintiffs were individuals who owned residential dwellings within the vicinity

vacancies terminated the nonconforming use exemption. By renting only two apartments, they argued, the owners had used the building as a two-family dwelling in accordance with its zoning classification. They further contended that the two unrented apartments constituted a nonconforming "portion" of the building. Because that "portion" of the building remained vacant for more than six months, it lost its nonconforming use status.

The Louisiana Supreme Court rejected the vacancy argument because it rejected the premise upon which it was based. The court refused to treat the fourplex as a structure that consisted of two "portions"—two apartments subject to a conforming use and two apartments subject to a nonconforming use. According to the court, the entire apartment building, not just a portion thereof, constituted the nonconforming use. Consequently, that part of the ordinance that provided for the loss of nonconforming uses of "portions" of buildings was simply inapplicable. In short, the building had to be treated as a single entity subject to one use.

Having treated the building as a single entity, the court had no difficulty concluding that the nonuse rule did not apply. Because the lessor had rented two of the apartments at all times, the building was never "vacant" so as to trigger the running of the six-month period.<sup>93</sup>

The court gave three reasons for this construction of the ordinance. First, the court noted that a contrary ruling might have deleterious effects on the rental market for residences. Construing the ordinance in the manner urged by the plaintiffs would "have the effect of discouraging a property owner from refurbishing apartments in a multi-apartment building . . . since he would risk the possibility of losing the use of part of his property if the renovations could not be completed and the apartment relet within a six month period."<sup>94</sup> Second, the court invoked the rule that zoning regulations must be interpreted in favor of the property owner whenever they are subject to more than one reasonable interpretation.<sup>95</sup> Third, the court noted that its construction of the ordinance followed the administrative construction that had been given to it by the city attorney.<sup>96</sup>

The fourth circuit's decision in *Jones v. Cusimano*,<sup>97</sup> the second of the nonconforming use decisions, makes clear that *Lozes* does not pre-

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of the fourplex. *Id.* at 1156. The courts have long implied a private right of action even though the statutory enforcement section, Revised Statutes 33:4728 (1988), only mentions public enforcement actions. See *City of New Orleans v. Leeco*, 219 La. 550, 53 So. 2d 490 (1951); *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314 (1929).

93. *Lozes*, 513 So. 2d at 1158.

94. *Id.* at 1157.

95. *Id.*

96. *Id.* at 1158.

97. 524 So. 2d 172 (La. App. 4th Cir.), writ denied, 525 So. 2d 1057 (1988).

clude termination of a nonconforming use when the property is vacant because of a depressed rental market. The property involved in *Jones* was a seven-apartment building. Like the property in question in *Lozes*, it was located in an area of New Orleans zoned for two-family dwellings. After all seven apartments remained vacant for slightly more than six months, the plaintiffs<sup>98</sup> sought an injunction prohibiting the defendant-landlord from using the property in violation of the zoning ordinance. The district court granted the petition.

On appeal, the defendant argued that the six-month vacancy did not terminate the nonconforming use because the "vacancy was not voluntary, but was caused by an inability to secure tenants."<sup>99</sup> The fourth circuit disagreed. It concluded that the ordinance's vacancy rule applies whether the vacancy is voluntary or involuntary. According to the court, "[t]hat the lack of tenants may have been beyond defendant's control [was] not legally material."<sup>100</sup>

The court of appeal acknowledged that two prior Louisiana appellate court decisions contain language supporting the defendant's claim, but it found both decisions distinguishable. In *Fuller v. City of New Orleans*,<sup>101</sup> the court included the voluntariness requirement in an explanation of the "general law of zoning."<sup>102</sup> However, *Fuller's* actual holding undercut the proposition that vacancies must be voluntary. In *Fuller*, the court applied the vacancy rule of the New Orleans ordinance to terminate the nonconforming use status of a barroom that the owner, because of illness, had not used for more than six months. The case contains "no suggestion that the owner 'voluntarily' became ill and discontinued the nonconforming use of the property."<sup>103</sup> In *Kinard v. Carrier*,<sup>104</sup> the other case on which the defendant relied, the court held that a vacancy resulting from the owner's inability to secure tenants did not amount to a discontinuation of use sufficient to terminate the property's nonconforming use status. *Kinard*, however, concerned the Lake Charles zoning ordinance, which "contained no specific provision" describing when a nonconforming use could be terminated for nonuse. Consequently, that decision was not controlling with respect to the New Orleans ordinance, which includes an express declaration that a six-month vacancy terminates a nonconforming use.<sup>105</sup>

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98. As in *Lozes*, the plaintiffs in *Jones* were other landowners in the neighborhood. See Petition for Preliminary Injunction, *Jones v. Cusimano*, La. App. 4th Cir. No. CA-8394.

99. 524 So. 2d at 173.

100. Id. at 174-75.

101. 311 So. 2d 466 (La. App. 4th Cir. 1975).

102. Id. at 468.

103. 524 So. 2d at 174.

104. 175 So. 2d 920 (La. App. 3d Cir. 1965).

105. 524 So. 2d at 174.

The *Jones* court also rejected the defendant's suggestion that those provisions of the ordinance which establish exemptions for certain specified involuntary vacancies like bankruptcy create a general involuntariness exception to the usual vacancy rule.<sup>106</sup> According to the court, those specific exemptions simply do not create such a general exception, especially since the ordinance itself "does not classify any use or nonuse as 'voluntary' or 'involuntary'."<sup>107</sup>

Taken together, *Lozes* and *Jones* stand for two propositions. First, they reaffirm the longstanding Louisiana rule that the termination of a nonconforming use on account of nonuse is permissible regardless of the reason for the user's failure to continue the nonconforming use. Second, they confirm the rule that zoning provisions governing the termination of nonconforming uses must be strictly construed, a rule that serves to mitigate the harshness of the nonuse rule. Thus, if a local government plans to extinguish a nonconforming use for nonuse, it must advise the property owner in clear and unequivocal terms.

This combination of termination authority and strict construction of termination provisions strikes a reasonable balance between the competing policies of treating property owners fairly and promoting the consistency of the comprehensive plan. The basic argument for allowing nonconforming uses to continue is that land use planning should not defeat the "reasonable investment-backed expectations" of the owner.<sup>108</sup> By demonstrating that the nonconforming use of the property has limited economic potential, a lengthy vacancy, regardless of the reason behind it, significantly diminishes the reasonableness of the owner's investment-backed expectations regarding the use. Terminating the nonconforming use status of such vacant property, an action that will promote comprehensive planning, can therefore be accomplished without fear of treating the owner unfairly. At the same time, a rule of strict construction insures that property owners will know precisely when the local government may terminate nonconforming uses and allows them to take appropriate steps to protect their investment-backed expectations.

The message for local governments with zoning authority is obvious. Louisiana law allows them to limit the adverse impact that nonconforming uses have on comprehensive land use planning. To take ad-

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106. For a description of the provisos in the New Orleans ordinance, see *supra* text accompanying note 90.

107. 524 So. 2d at 174.

108. The United States Supreme Court has increasingly used the "reasonable investment-backed expectations" standard to define the limits of the fifth amendment's ban on taking private property without paying just compensation. See, e.g., *Keystone Bituminous Coal Ass'n v. De Benedictis*, 107 S. Ct. 1232, 1242 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862, 2874 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S. Ct. 2035, 2042 (1980).

vantage of that authority, however, they must enact zoning ordinances that expressly describe when and under what circumstances discontinuance of a nonconforming use will terminate the property's nonconforming use status. Prudent local governments should review their zoning ordinances now, so that they, rather than the courts, can strike the balance between the competing policies of land use planning.

#### REVENUE POWERS

Like many large cities in the United States, New Orleans has experienced serious financial difficulties in recent years. Having exhausted traditional revenue sources, the city has adopted several innovative taxing measures over the last decade. After sustaining two of those measures in prior decisions, the Louisiana Supreme Court rejected a third in 1987. *City of New Orleans v. Scramuzza*<sup>109</sup> held that an "earnings tax" imposed on all income earned in the city violated the Louisiana Constitution.

The taxing authority of New Orleans is apparently unique among Louisiana municipalities. Under the 1974 Constitution, municipalities and parishes can levy only those taxes that are specifically authorized by the Constitution or by the state legislature.<sup>110</sup> However, the New Orleans home rule charter, which was "continue[d] in effect" by the 1974 Constitution,<sup>111</sup> gives the city broad taxing authority. Specifically, it allows the city to impose any taxes that are "not expressly prohibited" by the state constitution.<sup>112</sup>

The Louisiana Constitution contains several express limits on local taxing powers. For example, it forbids any parish or municipality from collecting a "license fee on motor vehicles"<sup>113</sup> or from levying an "income tax."<sup>114</sup> In addition, the Constitution limits the ad valorem taxes that local governments can collect on immovable property.<sup>115</sup>

In two decisions handed down around the turn of this decade, both of which were styled *ACORN v. City of New Orleans*,<sup>116</sup> the Louisiana

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109. 507 So. 2d 215 (La. 1987). The author was one of several persons who testified as expert witnesses on behalf of the city in *Scramuzza*. See *id.* at 216-17. By invalidating the tax, the Louisiana Supreme Court elected not to rely on that testimony. Obviously, the reader should be aware of this potential source of bias in evaluating the following criticism of the *Scramuzza* opinion and decision.

110. La. Const. art. VI, § 30.

111. *Id.* § 4.

112. 1936 La. Acts No. 388, § 1.

113. La. Const. art. VII, § 5.

114. *Id.* art. VII, § 4(C).

115. See La. Const. art. VI, §§ 26, 27; art. VII, §§ 18, 20, 21.

116. *Acorn v. City of New Orleans (Acorn I)*, 377 So. 2d 1206 (La. 1979), analyzed in Murchison, 1979-1980 Developments, *supra* note 3, at 493-99; *Acorn v. City of New Orleans (Acorn II)*, 407 So. 2d 1225 (La. 1981), analyzed in Murchison, 1981-1982 Developments, *supra* note 35, at 474-76.

Supreme Court narrowly construed the ban on vehicles license fees and the limits on ad valorem taxes. *ACORN I* upheld a \$100 service charge that New Orleans levied on every parcel of land listed on the city's tax rolls.<sup>117</sup> According to the supreme court, the enactment did not conflict with the constitution's limitations on the power of local governments to impose property taxes. Those limitations apply only to ad valorem taxes. The New Orleans levy was a specific tax, unrelated to the values of individual parcels. *ACORN II* employed an analogous analytical approach to validate a New Orleans ordinance that levied a "road use charge" on all automobiles registered in the parish or owned by persons residing in or businesses located in the parish. Finding that the city adopted the tax for the purpose of providing revenue<sup>118</sup> rather than for a "regulatory" purpose,<sup>119</sup> the court ruled that the levy was a tax, not a license fee. Because the constitutional provision only forbade local license fees, the levy in question fell outside the scope of the prohibition.

Several years after the supreme court decided the *ACORN* cases, the city of New Orleans began to experience acute revenue shortfalls. City officials thereupon took up the task of devising a new taxing scheme, one that they hoped would pass constitutional muster under the *ACORN* principles. The new tax, called an "earnings tax," applied to everyone working in the city; the amount of the tax was fixed at "1.5% of annual gross earnings, in excess of \$5,000."<sup>120</sup>

When the new tax was challenged, the city defended it by urging a strict construction of the constitutional ban on local income taxes. This prohibition, the city contended, only forbids taxes similar to the federal and state income taxes, that is, taxes that (1) include all income and not just earnings, (2) are levied on net income, (3) and incorporate a comprehensive set of deductions and exemptions. Applying this standard, the city contended that its tax clearly fell outside the perimeter of the constitutional ban. This tax was "levied only on one source of income" and was "measured by a percentage of gross earnings, rather than net income."<sup>121</sup>

In *Scramuzza*, the Louisiana Supreme Court unanimously rejected the city's argument. At the outset of the opinion the court identified principles of interpretation that would guide its resolution of the constitutional questions raised by the case. First, the court stated that one must give to constitutional language the meaning that "would have been given to those words or terms by the people when they adopted the

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117. 377 So. 2d at 1208.

118. 407 So. 2d at 1228.

119. *Id.*

120. *Scramuzza*, 507 So. 2d at 216.

121. *Id.* at 217.



Constitution."<sup>122</sup> Second, the court insisted that one may not consult the history of a constitutional provision in the search for interpretive guidance when "constitutional intent is evident" from the text and "explicit language" is used.<sup>123</sup> Applying these interpretive maxims to the problem before it, the court concluded that the earnings tax ran afoul of the constitution's ban on local income taxes.

Citing definitions of the term "income tax" found in legal dictionaries and federal and state statutes, the *Scramuzza* court conceded that "ascertain[ing] a precise definition of an income tax would prove to be a near impossible task" because the definition would "necessarily vary to conform to the various systems of income taxation." The court concluded, however, that it did not need to arrive at such a definition in order to resolve the issue. For that purpose the court had only to determine "if the Earnings Tax should be classified as a prohibited form of 'income tax' under our constitution."<sup>124</sup>

The evidence in the record convinced the court that the New Orleans levy was such a prohibited tax. When the term "income tax" is interpreted in a "natural and popular" rather than a technical sense, the court stated, it encompasses the New Orleans earnings tax. Because the income of the "vast majority of the people in this state consists only of wages, salaries, and commissions," those people, when they voted to adopt the constitution, must have understood that the income tax prohibition covers taxes like the earnings tax. Interpreted in this manner, the court insisted, the term was not "doubtful." Consequently, recourse to nontextual arguments like the history of the constitutional prohibition was inappropriate.<sup>125</sup>

The court's analysis in *Scramuzza* is unpersuasive. In other decisions of recent years, the court has not relied on either of the wooden maxims that it employed in invalidating the New Orleans earnings tax. The preference for "a natural and popular" interpretation conflicts not only with the technical approaches taken in *ACORN I* and *ACORN II*,<sup>126</sup> but also with another recent opinion in which the court declared that the constitution's "debt" limitations do not apply to revenue anticipation

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122. *Id.* (citing *Chehardy v. Democratic Executive Comm.*, 249 So. 2d 196 (La. 1971)).

123. 507 So. 2d at 218 (citing *Barnett v. Develle*, 289 So. 2d 129 (La. 1974)).

124. *Id.*

125. *Id.* The court described "the fiscal needs of the city" as "irrelevant" to "the legal principles which mandate our decision." *Id.* at 219.

126. See *Murchison*, 1981-1982 Developments, *supra* note 35, at 498 (praising the court's acceptance of the distinction between ad valorem and specific taxes); *Murchison*, 1979-1981 Developments, *supra* note 3, at 476 (commending the court's acceptance of the longstanding distinction between license fees and taxes).

notes.<sup>127</sup> Similarly, the court's insistence that the plain meaning of the constitutional text precluded it from considering nontextual arguments provides a jarring contrast to the court's willingness, during the same term, to use nontextual arguments in demonstrating that the word "authorized" is mandatory rather than permissive.<sup>128</sup> The court's decision also ignores decisions from other jurisdictions, rendered before the adoption of the constitution in 1974, in which various courts construed similar language in their own constitutions. In many of those decisions the courts allowed local governments to enact taxes calculated on the basis of worker earnings.<sup>129</sup>

Nor do the analytical weaknesses of *Scramuzza* lack practical significance. Many municipalities and other local governments face severe revenue shortfalls, and local revenue needs are likely to increase even further if the present governor succeeds in transferring to local governments a greater share of the responsibility for providing services. One can, therefore, reasonably expect that local governments will try to use all of the tax alternatives that are available to them in order to increase revenue and that, following the lead of New Orleans, other local governments are likely to begin assessing some charges against "free riders"—nonresidents who make demands on services, but escape the application of traditional taxes. *Scramuzza* provides little basis for predicting which tax efforts will prove successful.

The analytical shortcomings of the *Scramuzza* decision are even more regrettable because they were unnecessary. At least two analytically sound arguments could have supported the court's ruling. In the first place, one could have relied on the record of the constitutional convention. Delegates from the suburban New Orleans parishes, who were strong supporters of the ban on local income taxes, expressed concern that New Orleans might impose an income tax on suburban nonresidents. As a practical matter, the only nonresident "income" that New Orleans could possibly tax was then and still is income earned within the city. Because that earned income was the very item taxed by the New Orleans earnings tax, one could argue that the opponents to local income taxes

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127. *State Bond Comm'n v. All Taxpayers*, 510 So.2d 662, 665 (La. 1987) ("[W]e are persuaded that, as used, the word ['debt'] is a term of art or technical term to be interpreted according to its received meaning and acceptance with those learned in the field of governmental finance.").

128. *Reed v. Washington Parish Policy Jury*, 518 So. 2d 1044 (La. 1988), analyzed at *supra* text accompanying notes 57-78.

129. See, e.g., *City of Louisville v. Seabee*, 308 Ky. 420, 214 S.W.2d 248 (1948); cf. *Weekes v. City of Oakland*, 579 P.2d 449 (Cal. 1978) (post-1974 decision construing the California Constitution).

must have intended to include the earnings tax within the ban.<sup>130</sup> The second possible argument, which may be classified as "structural," rests upon the absence of *political* restraints upon the city's ability to tax nonresidents. Allowing the city to transfer a significant portion of its tax burden to nonresidents would subject those persons to taxes for which they have no effective redress in the political process. Moreover, the voters of the city are unlikely to provide a satisfactory surrogate for protecting the interests of such nonresidents. Because requiring nonresidents to pay city taxes would mean better services and lower taxes for city residents, rational voters in the city would be more likely to accept the earnings tax than tax measures that do not export the cost of government to suburban commuters. Unfortunately, the *Scramuzza* court cited neither of these arguments in support of its decision.

The difficulties with the *Scramuzza* court's analysis do not end with the court's failure to develop available historical and structural arguments. That analysis may be faulted on two additional grounds. First, the court neglected to justify its analytical approach. Absent from the opinion is any explanation of why the court abandoned the deferential, policy oriented approach of earlier tax cases. This omission gives the impression of judicial decision-making by assertion rather than by analysis. Second, the opinion does not aid in the prediction of future legal outcomes. On the contrary, it creates uncertainty regarding whether, in future cases, the court will rely on "plain meaning" and the "popular interpretation" technique or a policy-oriented approach coupled with an emphasis on the "technical" meaning of legal phrases. In future litigation regarding local taxes, the court will have two lines of decision available to it, and litigants will have no means of divining in advance which line the court will choose to follow.

The most regrettable aspect of *Scramuzza*, however, is not its analysis, but its result. As noted earlier, the text of the constitution did not dictate the result: The term "income tax" was ambiguous;<sup>131</sup> previous decisions had narrowly construed constitutional limits on the taxing powers of the city of New Orleans;<sup>132</sup> and past decisions had also accepted technical definitions of constitutional terms like "income tax" that had

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130. See 9 Records of the Louisiana Constitutional Convention of 1973, at 2853-54 (1973) (statement of Mr. Alario of Westwego opposing an amendment to permit local governments to adopt income taxes because it would allow the voters of one parish to "tax residents of another parish who work in that particular area" and describing the local income tax as an "earnings" tax).

131. See *Scramuzza*, 507 So. 2d at 218 ("To ascertain a precise definition of an income tax would prove to be a near impossible task.").

132. *Acorn v. City of New Orleans (Acorn I)*, 377 So. 2d 1206 (La. 1979); *Acorn v. City of New Orleans (Acorn II)*, 407 So. 2d 1225 (La. 1981).

been restrictively defined in other jurisdictions.<sup>133</sup> When the constitutional text does not compel the result, the ultimate test of the decision is how well it promotes sound policy, and the *Scramuzza* decision, unfortunately, does not advance the longterm interests of the state. Because the geographic boundaries of New Orleans encompass only a portion of the metropolitan area,<sup>134</sup> the city's tax basis has steadily eroded as individuals and businesses have relocated in the suburbs. The resulting pattern is a typical one for American cities: The reduced tax base produces both higher taxes and reduced services, and the rise in taxes and decline in services in turn accelerate migration to the suburbs. By denying the city the opportunity to tax nonresidents who are significant users of municipal services, the court has increased the likelihood that the decline of New Orleans will continue. That decline is regrettable. In the long run, it adversely affects not only the city but also the larger metropolitan area and the state as a whole.

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133. See *supra* note 127.

134. Legal, as well as practical, restrictions preclude the city of New Orleans from annexing territory in adjacent parishes. See La. R.S. 33:172(A) (Supp. 1987).

